BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RANCE H. REED Claimant VS. **SPIRIT AEROSYSTEMS, INC.** Respondent AND **AMERICAN HOME ASSURANCE CO.** Insurance Carrier	)	
RANCE H. REED Claimant VS. **CITY OF WICHITA** Self-Insured Respondent	)	Docket No. 1,052,459

ORDER

STATEMENT OF THE CASE

Respondent Spirit Aerosystems, Inc. (Spirit) and its insurance carrier, American Home Assurance Co., requested review of the February 17, 2011, Order entered by Administrative Law Judge Thomas Klein. Phillip R. Fields, of Wichita, Kansas, appeared for claimant. Vincent Burnett, of Wichita, Kansas, appeared for Spirit and its insurance carrier. Edward D. Heath, Jr., appeared for the self-insured respondent, City of Wichita (City).

Reed v. Spirit Aerosystems, Inc., Docket No. 1,033,849, is a post award medical case based on an original date of injury of March 12, 2007. An Agreed Award was entered on November 20, 2007, awarding claimant a 10 percent functional impairment to his right

lower extremity. Future medical benefits were left open to be awarded only upon proper application to and approval of the Director.

An Application for Hearing was filed in *Reed v. City of Wichita*, Docket No. 1,052,459, on September 10, 2010, in which claimant stated he had injured his right lower extremity through repetitive micro traumas to his right knee from January 2009 through September 2010 while working for the City. Claimant filed an Application for Preliminary Hearing on September 23, 2010, asking for medical treatment for injuries to his right knee. A preliminary hearing was scheduled for November 18, 2010. But on the ALJ's motion, the hearing was continued in order to allow Spirit to be present.

The two cases were consolidated for hearing on the issue of continued medical treatment to claimant's right lower extremity. A preliminary hearing and post award medical hearing was held on December 3, 2010. On February 17, 2011, the ALJ entered a joint order in both docketed claims, stating:

> Dr. Do is designated as the authorized treating physician for the claimant's knee. The court finds that the claimant's condition is a natural and probable consequence of his initial injury with Spirit, and this order is assessed against Spirit and their [*sic*] carrier.[1]

ISSUES

Spirit asserts that claimant failed to prove he requires additional medical treatment to his right knee. In the event the Board finds that claimant requires additional medical treatment, Spirit requests review of the ALJ's finding that claimant's current condition and need for treatment is a natural and probable consequence of his injury at Spirit. Spirit notes that Dr. John Estivo diagnosed claimant with osteoarthritis to the right knee, which he opined was preexisting and unrelated to claimant's March 2007 injury at Spirit. Spirit also argues that it is not liable for treatment to claimant's right knee because claimant suffered a subsequent intervening injury or aggravation of his condition. Spirit contends that after claimant left his employment with Spirit in December 2008, he worked for the City, where he aggravated his right knee condition and/or accelerated his need for treatment of his right knee.

The City argues there is ample evidence in the record, specifically the testimony of claimant and Dr. Pedro Murati, that supports the ALJ's finding that claimant is in need of ongoing medical treatment to his right knee and that such treatment is the natural and probable consequence of claimant's initial injury at Spirit in March 2007. Accordingly, the City asks the Board to affirm the ALJ's Award.

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[1] ALJ Order (Feb. 17, 2011) at 1.

Claimant contends he never had a complete resolution of the pain in his right knee from the March 2007 accident. Therefore, claimant argues the aggravation and/or acceleration of his condition as a result of performing his duties at the City are irrelevant. Claimant asks the Board to find that the ALJ's Order for post award medical benefits in Docket No. 1,033,849 should be affirmed. In the event the Board finds that claimant's work activities with the City are the primary cause of his need for medical treatment, then claimant contends that medical care should be provided by the City in Docket No. 1,052,459.

The issues for the Board's review are:

(1) Did claimant prove that he is in need of medical treatment to his right knee? Does the Board have jurisdiction over this issue in Docket No. 1,052,459, as it is the result of an order from a preliminary hearing?

(2) If the Board finds claimant is in need of medical treatment, is claimant's need for medical treatment a direct and natural consequence of his March 2007 injury at Spirit, a result of aggravation and/or acceleration of his condition due to his job duties at the City, or a result of a preexisting medical condition not related to his work activities or injuries?

FINDINGS OF FACT

Claimant previously worked for Spirit as a painter. In November 2005, claimant suffered injuries to his lower extremities. Dr. Estivo performed arthroscopic surgery on claimant's right knee on January 17, 2006.[2] The record is silent as to what, if any, work restrictions Dr. Estivo may have recommended. Claimant was sent to Dr. Murati by his attorney for an evaluation on April 5, 2006. After examining claimant, Dr. Murati diagnosed him with status post right knee arthroscopy, partial medial meniscectomy, chondroplasty to the patella and lateral tibial plateau, and bilateral patellofemoral syndrome. Dr. Murati placed restrictions on claimant of no squatting, crawling, driving with a manual transmission, kneeling, or repetitively using foot controls. Claimant should not lift, carry, push or pull over 35 pounds. He could lift, carry, push or pull occasionally up to 35 pounds and frequently up to 20 pounds. He could occasionally walk and stand, and should rarely climb stairs or ladders. Claimant should not lift below knuckle height. Dr. Murati restricted claimant to a sit down job.[3]

[2] There is no clear indication in the record of the disposition of the workers compensation claim in this matter. In Dr. Stein's independent medical examination report of September 24, 2007, he indicates that claimant said a settlement was made in the case, that he recovered completely, and that he returned to his same job.

[3] It appears that claimant went back to his same job as a painter.

Claimant had a second injury on March 12, 2007. An Application for Hearing was filed by claimant on March 27, 2007, in which he claimed a right knee derangement or tear that occurred when he was squatting at work and a weight fell on his right knee. Claimant underwent arthroscopic surgery on April 10, 2007, again performed by Dr. Estivo. He continued treatment with Dr. Estivo, who found he was at maximum medical improvement on May 23, 2007. Dr. Estivo noted that claimant ambulated with a non-antalgic gait at that time. Also on that date, Dr. Estivo noted that claimant had advanced arthritis to his right knee that was not work related. He suggested that claimant pursue the arthritis condition under private insurance. Claimant returned to Dr. Estivo on June 21, 2007, complaining of swelling in his right knee after crawling at work. He was not having pain in his knee. Dr. Estivo said that claimant had advanced degenerative joint disease, which would make his knee swell intermittently and which had nothing to do with his workers compensation case.

On July 11, 2007, claimant was again seen by Dr. Murati at claimant's attorney's request. At that time, claimant described an injury of November 2006, when he squatted at work and felt and heard three pops in his right knee.[4] Claimant complained of right knee pain, a limp, and popping in his right knee. After examining claimant, Dr. Murati diagnosed him with status post right knee arthroscopy and partial medial meniscectomy and right knee patellofemoral syndrome, which he related to claimant's work related injury that occurred in November 2006.[5]

On September 24, 2007, claimant was seen by Dr. Paul Stein for an independent medical examination that had been requested by the ALJ. Claimant told Dr. Stein that he had injured his right knee on March 12, 2007, when he came down too hard on it at work. Claimant told Dr. Stein that although he had intermittent swelling, a right sided limp, and some restriction in extension, he had no pain in his right knee. Examination showed that claimant had a mild swelling around the right knee and tenderness along the right medial joint line. He had crepitus at the right patella.

An Agreed Award was entered on November 20, 2007, in which it was agreed that claimant had a 10 percent permanent partial functional impairment to the right lower extremity based on a compromise of all issues, including the medical reports of Drs. Stein, Estivo and Murati. Claimant's right to post award medical treatment was left open.

Claimant testified at the Preliminary Hearing and Post Award Hearing that his right knee had never gotten to "zero pain," even after his first surgery. He continued to work for Spirit until December 2008, when he started working for the City as an equipment operator. Claimant testified that as an equipment operator, his primary job was to drive a truck.

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[4] Although Dr. Murati's report sets out a date of accident of November 2006, the facts of the accident appear to be approximately the same as those listed in claimant's Application for Hearing as having occurred on March 12, 2007.

[5] *Id.*

However, he stated he also would patch potholes and repair fences and guardrails. Claimant testified he had pain from the first day he went to work for the City. He said some days were worse than others. He still had intermittent swelling of the knee.

After claimant had worked for the City for about a year, he returned to see Dr. Estivo because his right knee pain was getting significantly worse. At the time, he did not think his work for the City had anything to do with the pain. After examining claimant, Dr. Estivo again diagnosed him with preexisting degenerative joint disease to the right knee unrelated to the March 12, 2007, injury at Spirit.

On March 25, 2010, claimant was referred to Dr. Murati by claimant's attorney to be examined a third time. Claimant reported that he had left his job with Spirit and had been working for the City of Wichita for approximately two years. Claimant was complaining of pain and swelling in his right knee. In 2007, Dr. Murati found that claimant had mild crepitus in his right knee, and in 2010 the crepitus was severe. Claimant's flexion contracture was better in 2010 than it was in 2007.

After the examination, Dr. Murati diagnosed claimant with right knee flexion contracture, permanent aggravation of right patellofemoral syndrome and knee degenerative disc disease. He recommended claimant have cortisone injections, and if that did not relieve his pain, then he would recommend Synvisc injections. Dr. Murati also recommended a repeat MRI to see why claimant's knee would not straighten. He gave claimant temporary restrictions of no climbing stairs or ladders, no squatting, crawling, driving a manual transmission, kneeling, or using repetitive foot controls. He could only rarely stand, walk or bend/crouch/stoop. He could lift, carry, push or pull occasionally up to 35 pounds and frequently up to 20 pounds. Dr. Murati temporarily restricted claimant to a sit down job. Dr. Murati said claimant described his duties at Spirit and at the City, and Dr. Murati opined it was more probable that claimant's condition is secondary to his employment at Spirit than the City. Dr. Murati said that apparently claimant, while working at Spirit, worked beyond common sense and that if claimant had followed Dr. Murati's 2006 restrictions, he would not have gone through the problem again.

Dr. Murati did not recommend total knee replacement in July 2007 but recommended it in 2010 because of claimant's increased pain due to continuing degeneration of the knee. Dr. Murati said that as a result of claimant's injury at Spirit, his need for total knee replacement had been permanently accelerated. Dr. Murati continued to believe that claimant's condition and requirement for further treatment related back to claimant's original injury at Spirit. He also believed that claimant's subsequent work activities at the City would have permanently aggravated or permanently accelerated his need for a total knee replacement.

On May 25, 2010, claimant was again seen by Dr. Stein, this time at the request of Spirit. Claimant denied any additional injuries since Dr. Stein's last evaluation of September 24, 2007. He said he was working full time for the City of Wichita with no

medical restrictions. He complained that his right knee pain was worse than before and hurt constantly. Dr. Stein reviewed x-ray images of the right knee taken in 2007 and in 2010 and saw no significant difference in the cartilage intervals or bony structures. Claimant's range of motion was essentially the same as in September 2007. Dr. Stein recommended an MRI scan of the knee to compare with previous studies. On June 22, 2010, Dr. Stein issued a supplemental report indicating he had compared an MRI of claimant's right knee with the MRI done in March 2007, and the MRI did not reflect any new abnormalities. Dr. Stein had no recommendation for further tests or treatment to claimant's right knee, although he noted that someday claimant may need a total knee replacement.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2010 Supp. 44-510k(a) states:

> At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

K.S.A. 44-534a(a) states:

> (1) After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. . . .

> (2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[6] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[7] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[8]

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers

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[6] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[7] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[8] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

compensation turns on whether claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[9]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[10] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[11] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[12] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

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[9] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[10] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[11] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[12] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

In *Graber,*[13] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[14]

In *Logsdon*,[15] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Finally, in *Casco*,[16] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

ANALYSIS

The ALJ's Order awarded medical treatment to be paid by Spirit, the respondent in Docket No. 1,033,859. Therefore, the Board will first address the issues raised in that docketed claim.

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[13] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[14] *Id.* at 728.

[15] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

[16] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

(1) Did claimant prove that he is in need of medical treatment to his right knee? This is a post award proceeding brought pursuant to K.S.A. 2010 Supp. 44-510k. The Board has jurisdiction of this issue because, as to this docketed claim, the ALJ's award of benefits is a final order. K.S.A. 2010 Supp. 44-510k, K.S.A. 2010 Supp. 44-551(i)(1) and K.S.A. 2010 Supp. 44-555c(a) give the Board jurisdiction to review a post award order for medical benefits and all final orders entered by an ALJ.

The record before the Board contains opinions from three medical experts on the question of whether claimant is in need of additional medical treatment, namely: Drs. Estivo, Stein and Murati. Dr. Estivo was the physician authorized by Spirit to treat both of claimant's two prior work-related knee injuries. In both instances Dr. Estivo performed surgery and released claimant to return to work for Spirit. After examining claimant again in connection with this post award proceeding, Dr. Estivo opined that claimant was not in need of any additional medical treatment for the injuries for which the doctor had previously treated claimant.

Dr. Stein performed a court-ordered IME in connection with the pre-award proceedings in this claim. He examined claimant again post-award at the request of Spirit. After ordering a new MRI and comparing it to claimant's prior MRI and comparing claimant's current x-rays to the x-rays taken in 2007, Dr. Stein opined that there had been no change in claimant's condition and he did not recommend additional treatment at this time. He did say that claimant would likely need a knee replacement sometime in the future.

Dr. Murati saw claimant after both of his work-related injuries with Spirit and examined claimant again in connection with this proceeding–each time at the request of claimant's counsel. He recommended additional treatment, including that claimant proceed with knee replacement surgery.

The Board finds the opinions of Drs. Estivo and Stein to be the most credible with regard to whether claimant is in need of additional medical treatment for his work-related right knee condition. Dr. Estivo is an orthopedic surgeon who has treated claimant over a period of years. Dr. Stein is a board certified neurosurgeon who initially saw claimant as a court-ordered neutral examiner. He also has had the benefit of reviewing claimant's medical treatment history, ordering tests and performing physical examinations of claimant on more than one occasion. And while Dr. Murati has likewise examined claimant several times over a considerable period of time, he is neither an orthopedic nor a neurosurgeon, he has never treated claimant and he has not seen claimant as a neutral examiner. In this instance, Dr. Murati's opinion that claimant is currently in need of a knee replacement surgery carries less weight than the opinions of the other two medical experts.

(2) With this finding that claimant has failed to prove he is in need of additional medical treatment in Docket No. 1,033,849, the remaining issue; to wit, whether claimant's need for treatment is as a natural and probable consequence of his work related injury, is moot.

Turning now to Docket No. 1,052,459, this is an appeal from a preliminary hearing, not a final order. Thus, not every alleged error is appealable at this stage of the proceedings. The Board's jurisdiction is limited to an allegation that the ALJ somehow exceeded his jurisdiction and to those issues specifically enumerated as jurisdictional in K.S.A. 44-534a(a)(2). It is not alleged that the ALJ exceeded his jurisdiction in finding claimant to be in need of additional medical treatment and that is not an issue enumerated in K.S.A. 44-534a as jurisdictional on an appeal from a preliminary hearing order. Therefore, for purposes of this appeal in Docket No. 1,052,459, the Board must accept the ALJ's determination that claimant has proven a need for additional treatment and move on to the second issue of whether claimant's need for treatment is causally related to his work with the City.[17] Implicit in the ALJ's finding that "claimant's condition is a natural and probable consequence of his initial injury with Spirit" is a finding that claimant did not suffer an intervening injury with the City. That is a finding that claimant did not suffer an accident that arose out of and in the course of his employment with the City. This issue is one of the jurisdictional issues enumerated in K.S.A. 44-534a(a)(2) that the Board may consider on an appeal from a preliminary hearing order. Stated another way, the issue before the Board is whether claimant has proven that he suffered a new series of accidents and aggravations to his right knee that arose out of and in the course of his employment with the City. To find the answer to this question, the Board must again look to the opinions of the three medical experts whose testimony is in the record.

Dr. Estivo relates claimant's current symptoms and complaints to degenerative arthritis that he says is caused by claimant's age and not the industrial accidents or injuries that claimant suffered at Spirit. Dr. Stein does not see any significant change in claimant's condition between 2007 and now. Thus, it seems logical that Dr. Stein would not describe claimant's work activities with the City to have aggravated claimant's knee condition beyond what occurred while claimant was working for Spirit. Dr. Murati, however, found that claimant's condition was now worse than it was in 2007. Furthermore, he opined that claimant's work activities with the City permanently aggravated and accelerated claimant's condition and need for treatment. Assuming, as we must, for purposes of this appeal of the preliminary hearing order, that claimant is in need of additional medical treatment, the only medical opinion that directly addresses the cause of that condition is Dr. Murati's opinion concerning a work-related aggravation. Dr. Murati does not say that claimant's condition and need for treatment is the same now as it would have been even if claimant had not gone to work for the City. Therefore, Dr. Murati's opinion can be seen as excluding normal activities of day to day living or the natural aging process as the only causative factors. And although Dr. Estivo relates claimant's current symptoms to the natural aging process, he did not opine that claimant is in need of treatment. Given that the Board must accept

[17] Furthermore, the City does not appear to dispute that claimant is in need of additional medical treatment for his knee. The City only disputes that it is responsible for providing that treatment. "There is ample evidence in the testimony of the claimant and in the testimony of Pedro Murati, M.D. to support the Court's finding that the necessity for ongoing medical treatment is the natural and probable consequence of the claimant's initial knee injury with Spirit." Respondent City of Wichita brief at 2 (filed Apr. 13, 2011).

in this docketed claim that claimant does need additional treatment, unlike in Docket No. 1,033,849 where the Board had jurisdiction of that issue, Dr. Stein's and Dr. Estivo's opinions are here afforded less weight. The Board is persuaded by Dr. Murati's opinion because it is the only opinion that is directly on point to the issue of causation of claimant's current need for medical treatment, accepting the ALJ's determination that treatment is necessary. This conclusion that claimant's current condition and need for treatment are the result of a new series of accidents and aggravations to the preexisting knee condition that occurred during claimant's employment with the City rather than it being a natural consequence of claimant's prior injury at Spirit is further supported by the medical records that show claimant was pain free for a time after his last surgery, contrary to claimant's testimony that he was never pain free. As such, the treatment the ALJ ordered to be provided by Dr. Do is to be provided in Docket No. 1,052,459 and is the responsibility of the City.

CONCLUSION

(1) In Docket No. 1,033,849, the Board has jurisdiction to review the issue of whether claimant is in need of additional medical treatment. The Board finds that claimant has not proven a need for additional treatment in Docket No. 1,033,849. However, in Docket No. 1,052,459, the Board is without jurisdiction to review the ALJ's determination that claimant is in need of additional medical treatment. Therefore, in that docketed claim the Board must accept the ALJ's finding that claimant is in need of treatment.

(2) Claimant is not entitled to additional treatment in Docket No. 1, 033,849. But in Docket No. 1,052,459, given the finding that claimant is in need of additional treatment, the need for treatment is as a result of an aggravation and acceleration of claimant's preexisting condition caused by his work activities with the City.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Thomas Klein dated February 17, 2011, is reversed as to Docket No. 1,033,849 and the ALJ's Order is modified to require the ordered medical treatment to be provided by the respondent in Docket No. 1,052,459.

IT IS SO ORDERED.

Dated this _____ day of May, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the majority opinion assessing the liability for claimant's ongoing need for medical treatment against the City of Wichita. K.S.A. 2010 Supp. 44-555c(a) limits the Board's jurisdiction to questions of law and fact as decided by the ALJ. Here, the ALJ found liability against Spirit and it's insurance company, American Home Assurance Co., for the injuries suffered by claimant while in Spirit's employ. However, a finding of liability against Spirit is not a finding involving the City of Wichita. Claimant's injuries could have been from preexisting degenerative joint disease as found by Dr. Estivo or from claimant's employment with either Spirit or the City of Wichita. The Order of the ALJ finds the condition to stem from claimant's employment with Spirit. There is no finding regarding the preexisting disease or regarding claimant's employment with the City of Wichita. Therefore, by addressing the potential for an accident with resulting injury with the City of Wichita, the Board is, in effect, determining an issue not addressed by the ALJ.

Additionally, the majority finds the opinion of Dr. Murati to lack credibility due to the expert training of both Dr. Estivo and Dr. Stein. Less weight was assigned to Dr. Murati's opinion than that of the other, more qualified experts. The majority then reverses course by finding that Dr. Murati's opinion regarding the potential aggravation and acceleration of claimant's condition carries more weight than the contrary opinions of both Dr. Stein and Dr. Estivo. This Board Member would find that Dr. Murati's opinion is outweighed by the opinions of Dr. Estivo and Dr. Stein in all aspects of this case.

The undersigned Board Member would not disturb the finding by the majority that claimant has failed to prove a need for additional treatment in Docket No. 1,033,849. But, the assessment of the need for treatment against the City of Wichita in Docket No. 1,052,459 should be reversed and no liability should be assessed against the City of Wichita.

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BOARD MEMBER

c: Phillip R. Fields, Attorney for Claimant
Vincent Burnett, Attorney for Respondent Spirit and its Insurance Carrier
Edward D. Heath, Jr., Attorney for Self-Insured Respondent City of Wichita
Thomas Klein, Administrative Law Judge